

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ROBERT A. COSTA,)	
)	
Charging Party,)	Case No. SF-CE-374-H
)	
v.)	PERB Decision No. 1087-H
)	
THE REGENTS OF THE UNIVERSITY OF)	March 1, 1995
CALIFORNIA,)	
)	
Respondent.)	
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Appearances: Robert A. Costa, on his own behalf; Lawrence W. Hanson, Labor Relations Advocate, for the Regents of the University of California.

Before Blair, Chair; Carlyle and Johnson, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Robert A. Costa (Costa) to the proposed decision of a PERB administrative law judge (ALJ) (attached hereto). In his proposed decision, the ALJ dismissed Costa's unfair practice charge in which he alleged that the Regents of the University of California (University) unlawfully laid him off in violation of section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).¹

¹HEERA is codified at Government Code section 3560 et seq. Section 3571 states, in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

The Board has reviewed the entire record in this case, including Costa's exceptions and the University's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be without prejudicial error and, therefore, adopts them as the decision of the Board itself.

ORDER

The complaint and unfair practice charge in Case No. SF-CE-374-H are hereby dismissed.

Chair Blair and Member Johnson joined in this Decision.

guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT A. COSTA,)	
)	
Charging Party,)	Unfair Practice
)	Case No. SF-CE-374-H
v.)	
)	PROPOSED DECISION
THE REGENTS OF THE UNIVERSITY OF)	(10/24/94)
CALIFORNIA,)	
)	
Respondent.)	

Appearances: American Federation of State, County and Municipal Employees, Council 10, by Mary Higgins, for Robert A. Costa; Lawrence Hanson, Labor Relations Advocate, for the Regents of the University of California.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

Robert A. Costa (Costa) filed an unfair practice charge on May 12, 1993. After investigation, and on June 10, 1993, the deputy general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the Regents of the University of California (University). The complaint alleged that from 1988 through 1992, Costa exercised his Higher Education Employer-Employee Relations Act (HEERA or Act)¹ rights by obtaining representation from the American Federation of State, County and Municipal Employees (AFSCME), and by complaining on his own behalf about overtime, time clock procedures and reclassification. It was further alleged that because of this activity, the University laid Costa off from his position as

¹HEERA is found in Government Code section 3560 et seq. All section references are to the Government Code unless otherwise noted.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

storekeeper. This action was alleged to be a violation of section 3571 (a) .²

The University filed its answer on July 2, 1993, denying any violation of the Act.

A PERB-conducted settlement conference did not resolve the dispute. Formal hearing was conducted on July 6, 1994. The University filed its post-hearing brief on July 27, 1994. Costa acknowledged the University's brief on August 22, 1994, and indicated that a response would be forthcoming. None was received by the undersigned.

FINDINGS OF FACT

Mr. Costa was an employee and the University is an employer within the meaning of the Act.

Costa has been employed within the University reprographics department (department) as a storekeeper since August 1986. Costa is a member of AFSCME, the exclusive representative of clerical and service employees at the University. Keith Braxton (Braxton) has been the department manager since 1987.

The department also employed reprographic technicians and press operators who worked in the bindery area. Costa was the only storekeeper in the department.

²Section 3571(a) provides that it is unlawful for the University to:

Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

Costa's job duties statement indicated he was to spend 50 percent time in the bindery area. The rest of his time was spent in purchasing supplies, inventory control, and mailing out jobs. He worked in the bindery section every day for a couple hours. This involved boxing envelopes, invitations and letter heads. He would also shrink wrap, collate, and drill some items. Braxton said that Costa was never able to devote more than 20 percent time to bindery duties. His work in the bindery was mostly boxing jobs for shipment.

Braxton urged Costa to learn the machinery in the bindery. According to Costa, there was not enough time for him to take the training.

The Time Clock

When Braxton came to the department in 1987, all department employees used the time clock. Included in this group were an administrative assistant and a billing assistant. Braxton considered these positions to be desk-type jobs. He determined that the administrative assistant did not need to punch the time clock as the position was unrelated to production work for which billing was required. Thereafter, the billing employee requested exemption from the time clock and the request was granted.

On August 9, 1991, the unit had a group meeting at which was discussed, among other matters, the time clock. At least two options were discussed. One was that all staff employees would punch in and out at the start and end of each working day. Each employee was to have a regular start and end time approved by

their supervisor, with a 15-minute "window period" before or after their approved start time. Each employee was to work an 8 hour day, and would take a one-half hour lunch and two 15-minute breaks.

The second option was that there would be no time clock and staff would be expected to arrive and leave at the same pre-approved time each day.

On October 22, 1991, Braxton announced to employees that a time clock policy promulgated on October 18, 1991, was to be put into abeyance while he conferred with labor relations and other sources. The stated reason for this action was:

As of yesterday I have received comments indicating that some employees still believe this policy is not equitable due to fact that non-represented employees would not be required to use the time clock and that this was not clear when we polled everyone for their preferences on a policy.

Costa and one other employee in the department, Ed Drayton, were members of the union. Costa complained about favoritism in the department. He complained to a supervisor about the disparity of the time clock procedures. Pressmen, lithographic technicians, bindery technicians, a coping person and Costa had to use the timeclock. All these employees worked in the shop area.

In January of 1992, a bar code was put into place instead of the time clock. It is used for jobs as well as break and lunch periods.

Later, Costa made a complaint to an AFSCME representative. The representative, along with Costa, met with Braxton. Braxton could not resolve the issue.

Braxton expressed frustration over the time clock issue. He said the complaints were coming from two people, Costa and Drayton. Two other people would have been adversely affected by the elimination of the time clock, which, according to Braxton, precluded resolution of Costa's complaint. Braxton testified the issue was a "thorn" in his side.

The Overtime

According to Costa and Mary Higgins (Higgins), AFSCME representative, overtime is supposed to be on the basis of seniority. Overtime was not provided to all the employees.

Steve Fox, the supervisor, assigned the same people to work the overtime. The pressmen, one bindery technician and a retiree were used most frequently, usually on weekends.

Costa complained that he got no overtime. In September of 1992 Costa went to AFSCME representative Dana Ahlgren (Ahlgren). A few days later, Ahlgren met with Braxton on the overtime issue.

Costa testified that Braxton told Ahlgren that one-on-one meetings with employees could be arranged to resolve the dispute.

In the summer of 1992, Higgins discussed with Braxton the unit's failure to observe the contractual requirements on overtime. She filed a grievance on behalf of Drayton.

The Layoff

Braxton felt the storekeeper's position was the most expendable because it did not create revenue for the department. The storekeeper's duties could be spread among other workers.

On October 2, 1992, Braxton submitted a plan to Linda Glasscock, University labor relations coordinator, to reorganize the reprographics department. The core of the plan was to assign storekeeper duties of purchasing and inventory of supplies, and receiving orders and supplies to the senior reprographic supervisor. In addition, ordering supplies was to be integrated into a computer program to automate purchasing and inventory maintenance. Packaging of reprographic jobs would be done by the bindery staff. The plan was approved by labor relations.

On November 13, 1992, Braxton notified Costa that he was to be laid off from employment with the University, effective December 13, 1992. The action was stated to be predicated upon the need to reduce staff in the reprographics department due to "internal reorganization." Costa was relieved from daily work attendance, from November 14, in order to give him additional time to look for another position.

No other department employees were laid off at this time. The layoff was in accordance with the memorandum of understanding provisions on layoff.

Braxton testified that the department had suffered reduction in income, as a recharge unit, because its customers, other University departments, were experiencing severe budget

reductions, resulting in fewer job orders. In addition, other University departments are not required to use the reprographics department services, thus it must compete with outside printers and copy services. The Department cannot incur a deficit, as it has no other revenue resources.

Documentation submitted by the University reflecting year-to-date revenues and expenses as of September 30, 1992, show an anticipated deficit of \$106,758. With this information, Braxton designed the reorganization that resulted in the elimination of Costa's storekeeper position.

The department has continued to downsize since October of 1992. In October of 1992, just before Costa's layoff, a principal reprographics technician resigned. The vacancy was not filled for budgetary reasons. After Costa's layoff, two senior clerks were laid off in May of 1993, and an administrative assistant II clerk was laid off in December of 1993. These layoffs were to offset reduction in income.

Costa was a candidate for other jobs at the University.³ In January of 1993, he was offered a position as a stores worker in the material management department. Costa declined because he did not like the hours.

At the time of hearing, Costa had retired from the University. By retiring he gave up preferential rehire rights.

³The collective bargaining agreement gave him preferential rehire status for reemployment.

At the time of hearing Costa was working for the San Mateo County Schools Office.

ISSUE

The issue in this case is whether the University laid Costa off from his position as storekeeper because of his protected activities in violation of HEERA?

CONCLUSIONS OF LAW

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No.

104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) Once employee misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained but for his union membership or his performance to other protected activities. [Ibid.; emphasis added.]

Section 3565 provides:

Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. . . .

Costa complained about time clocks over a two year period into the summer of 1992. He and an AFSCME representative met with Braxton on the time clock issue. The issue was a thorn in Braxton's side.

Costa complained about the absence of overtime in the summer of 1992. As a result of his complaint, Ahlgren met with Braxton in September of 1992 on the overtime issue.

Using a union representative to pursue matters relating to working conditions is protected conduct. (Regents of the University of California (1983) PERB Decision No. 319-H.) Costa's use of AFSCME representation on both the time clock issue and his entitlement to overtime constitutes protected activity.

There is no question that the University was aware of Costa's activities as both issues were raised directly with Braxton.

These issues preceded the layoff by only a few months. Indeed, uncontradicted was Costa's testimony that Ahlgren met with Braxton in September 1992, about the overtime issue. In October Braxton submitted plans to reorganize the department by eliminating Costa's position.

Although timing of the adverse action alone is not sufficient to justify an inference of unlawful motivation (Charter Oak Unified School District (1984) PERB Decision No. 404) it may, when coupled with other factors, constitute a basis for such conclusion. (Campbell Union High School District (1988) PERB Decision No. 701; Moreland Elementary School District (1982) PERB Decision No. 227.)

The time clock issue was a long and contentious problem for Braxton. He could not bring resolution to the issue. Costa was one of two people on one side of the issue. The issue was a thorn in his side, said Braxton.

I draw an inference of unlawful motivation from this candid display of Braxton's reaction to Costa's persistence on the time

clock issue and the timing of the decision and implementation of Costa's layoff. In the summer of 1992, Costa was pushing Braxton on the time clock policy. In September, Ahlgren visited Braxton, on Costa's complaint about the overtime policy. The next month Braxton drew up a plan to eliminate Costa's position.

The burden now shifts to the University to demonstrate it would have taken the action it did, regardless of Costa's protected activity.

The evidence presented by the University is that the reprographics department was operating with a deficit budget. As of the end of the first quarter of the 1992-93 fiscal year, there was projected a deficit of over \$100,000. Because the unit was not generally funded, but relied on revenue from jobs the unit serviced, there could be no deficit at the end of the fiscal year.

One reprographics technician had resigned and was not replaced, because of the budgetary shortfall. Costa's position as storekeeper was not directly billable, but was part of the overhead charged to each project. His duties did not generate billable hours.

In addition, part of Costa's duties, the manual inventory for ordering supplies, was automated by the new computer system. Other duties of the storekeeper were able to be undertaken by others in the department. Thus, where the department clearly needed to reduce expenses, the storekeeper position was the most expendable.

Other staff were laid off after Costa, further confirming that the action taken against Costa was not retaliatory, but rather in keeping with a drastic fiscal shortfall, necessitating the reduction in staff.

It is concluded that the University has demonstrated that it would have laid Costa off, regardless of his exercising his right to protest the time clock or the overtime issue. The unfair practice charge should be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Board itself.

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an extension of time to file exceptions must be filed with the Board itself (Cal. Code of Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of

service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (Cal. Code of Regs., tit. 8, sec. 32135; Cal. Code of Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Gary M. Gallery
Chief Administrative Law Judge